



[digitalcommons.nyls.edu](https://digitalcommons.nyls.edu)

---

Faculty Scholarship

Other Publications

---

1973

# Book Review of The Modern Supreme Court by Robert C. McCloskey

Edward A. Purcell Jr.

*New York Law School*, [edward.purcell@nyls.edu](mailto:edward.purcell@nyls.edu)

Follow this and additional works at: [https://digitalcommons.nyls.edu/fac\\_other\\_pubs](https://digitalcommons.nyls.edu/fac_other_pubs)



Part of the [Supreme Court of the United States Commons](#)

---

## Recommended Citation

58 *The American Historical Review* 180–181 (1973).

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Other Publications by an authorized administrator of DigitalCommons@NYLS.

farmer has fretted over the possibility of criminal conviction. It is true, as Daniel notes, that judicial decrees against peonage have hardly impeded peonage farming. But Daniel's own evidence suggests that the perpetual threat of criminal conviction has induced many peonage farmers to deny—even to themselves—that they have held bondsmen. This sharply distinguishes them from their antebellum predecessors who openly and often proudly acknowledged the master-slave relationship.

The book falls short on another count. Daniel concentrates upon publicized events. Chapters focus upon newsworthy incidents in the history of peonage like the Alonzo Bailey case and the Jasper tragedy. Yet the newsworthy is necessarily the exceptional. The plight of most black peons provoked neither litigation nor publicity. Unheralded conditions typified life upon the peonage farm and much more needs to be known about such conditions.

These qualifications aside, *The Shadow of Slavery* merits very serious consideration. Its message is important for historians and indispensable for the wider reading public.

LAWRENCE J. FRIEDMAN  
*Bowling Green University*

GEORGE S. MCGOVERN and LEONARD F. GUTTRIDGE.  
*The Great Coalfield War*. Boston: Houghton Mifflin Company. 1972. Pp. xii, 383. \$8.95.

The Great Coalfield War began in September 1913 as a routine walkout of Colorado miners designed to achieve recognition of the United Mine Workers of America. Sporadic violence and brutality on both sides culminated seven months later in the pitched battle between strikers and state militia labeled (with some justification) the Ludlow Massacre by the union publicity director. A virtuoso performance by federal troops brought order to the coal fields but no reprieve for the strikers. Defeated in every way they gave up the struggle in December 1914 without having obtained a single concession from the operators.

This is history in the narrative and biographical vein, and on both accounts it succeeds admirably. Particularly impressive are the portraits of figures identified with the operators: John D. Rockefeller, Jr., absentee director

of the Colorado Fuel and Iron Company, a philanthropist whose philanthropy ignored the workers in his own mines and who, pursuing a policy of noninvolvement, became the national focus of the drama; Elias Ammons, Colorado's irresolute governor, incapable of leadership in a crisis; and Brigadier General John Chase of the state National Guard, who fell off his horse while trying to stop a parade of women seeking freedom for the imprisoned Mother Jones. Chase met laughter with the command, "Ride down the women!"

What emerges clearly from this work is the extraordinary power of corporate America in a rural-industrial setting. Among the most reactionary of businessmen, the Colorado coal operators dominated municipal, county, and—to some extent—state politics. Although the authors belatedly claim difficulty in separating the heroes from the villains, the operators qualify nicely as the latter. Not only did these "anarchists for profit" distort and mutilate the law enforcement and judicial systems, but their total rejection of negotiations, even when the union had waived the key demand for recognition, appears indefensible. The authors hypothesize that the antidemocratic climate was in part a product of frontier isolation, Frederick Jackson Turner notwithstanding. Southern Colorado, at any rate, was a far cry from Herbert Gutman's Paterson, New Jersey.

There is, unfortunately, no systematic attempt to explain why the coal operators acted as they did or why they differed from other businessmen, an omission perhaps related to the absence of an adequate survey of competitive conditions in the Western coal industry. And the strikers, although adequately treated, remain somewhat mysterious. On the whole, however, this is a remarkably good book, well written and well researched, suffering little from its origin as McGovern's 1953 doctoral thesis. The only serious error was made by the publisher, for there are no footnotes.

WILLIAM GRAEBNER  
*State University of New York,  
College at Fredonia*

ROBERT G. MCCLOSKEY. *The Modern Supreme Court*. Cambridge, Mass.: Harvard University Press. 1972. Pp. x, 376. \$12.95.

ROBERT SHOGAN. *A Question of Judgment: The Fortas Case and the Struggle for the Supreme Court*. Indianapolis: Bobbs-Merrill Company. 1972. Pp. x, 314. \$10.00.

Professor Robert M. McCloskey's untimely death in 1969 deprived American scholarship of one of its most thoughtful voices. His posthumously published study of *The Modern Supreme Court* contains essays on the Stone (1940-46) and Vinson (1946-53) Courts together with seven previously published articles on the Warren Court covering the years from 1954 to 1965. Presumably Professor McCloskey had intended to expand the reprinted essays, and the lack of revision both adds to and detracts from the book. It is unfortunate insofar as major cases are slighted or left out (*Katz*, *Miranda*, *Gideon*, *Time v. Hill*), and the whole is a bit unbalanced and perhaps overly narrow. At the same time, however, the collection of articles, written over a period of ten years, provides a compelling portrait of a thoughtful student of constitutional law trying to evaluate the Court's new assertiveness. Similar to Louis Jaffe's *English and American Judges as Lawmakers*, the book reveals the struggle of a scholar bred in the tradition of judicial restraint characterized by Justice Frankfurter and increasingly attracted by many of the new results, especially in the areas of desegregation and free speech. Disposed to defend the Court as an institution, yet exceedingly wary of the new "activism," Professor McCloskey began to search for a new conception of the proper role of judicial review as well as a theory of its practical potential and limitations. The Warren Court, he commented, had shown "enough success to suggest that our traditional ideas about the range of judicial capacity may require reappraisal" (p. 10). It is a great loss that his reappraisal was cut short.

The essays are dotted with careful and perceptive comments. The dynamic relation between Court and society, the perennial question of judicial craft, the enigma of the ultimate results of a widespread acceptance of a judicial realism, and the need for a shrewd husbandry of the Court's prestige emerge as central themes. Although the emphasis is on the Court as an institution, Professor McCloskey gives attention to the attitudes of individual justices—Black's absolutism, Douglas's result-

orientation, and Frankfurter's restraint. That the individual justices deserve even greater attention is suggested by the author's discussion of the determined and perhaps ultimately self-defeating decision of those major figures to hold to their own separate and rather unpromising constitutional approaches. It is easy from the present perspective to think that more flexible attitudes might have helped unify the Court, eliminate many of the innumerable concurring opinions and dissents, and have thereby left a firmer and clearer legacy of precedent to its successors. But, of course, that might also have made many of the Warren Court's more advanced decisions impossible.

Robert Shogan's book picks up in a sense where Professor McCloskey's leaves off. A journalist assigned to cover the Supreme Court, Mr. Shogan chronicles the career of Justice Abe Fortas and the series of events that led to his resignation in 1969. It is more a story of political maneuvering that foreshadowed the abrupt demise of the Warren Court than an insightful biography of the justice. Whatever the motives that moved Fortas, they remain as elusive as they are intriguing. *A Question of Judgment* is highly readable and informative, though it remains superficial, due in large part to the refusal of some central figures to grant interviews and the undoubted desire of others to protect partisan interests. Unfortunately, too, the author contents himself with detailing generally known facts and scarcely treats what seem the more significant issues. Fortas's career raises some of the major questions about the nature of American government since the thirties: the sociological experience of the young men who staffed the New Deal and grew in an atmosphere of expanding bureaucratic power, the institutionalization of the Washington lawyer, the pattern of political accommodation among the initiated that propels government decisions, and the very way such men conceive of themselves and their public duties. All of these are crucial questions; and while they are beyond answer in any one book, it is regrettable that Mr. Shogan did not approach them more directly and thereby enable his study to speak more profoundly.

EDWARD A. PURCELL, JR.  
University of Missouri,  
Columbia